IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 278 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MRS HETAL BAIJU PANDIT

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 278 of 2002
MR SV RAJU for
MR RJ GOSWAMI for Petitioner No. 1
MS NANDINI JOSHI APP for Respondent No. 1-3
NOTICE SERVED for Respondent No. 4-7

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE H.H.MEHTA

Date of decision: 06/05/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In this petition which is filed under Article 226 of the Constitution, the petitioner who is the mother of the minor Prem Baiju Pandit aged about 4 months has prayed to issue a writ of Habeas Corpus, directing the respondent nos. 2 and 3 to see that the respondent nos. 4 to 6 produce the respondent no. 7 i.e. minor boy before the Court and hand over custody of the child to her.

2. The marriage of the petitioner was solemnized with the respondent no. 4 as per the Hindu rites at Ahmedabad on November 8, 1997. The respondents no. 5 and 6 are father-in-law and mother-in-law respectively of the petitioner, whereas the respondent no. 7 is baby boy born to the petitioner during subsistence of her marriage with the respondent no. 4. It is averred by the petitioner that after the marriage, the petitioner and the respondent no. 4 had migrated to U.S.A. and were living in U.S.A. and that a baby boy was born during subsistance of the marriage on January 5, 2002 in U.S.A. In support of the averments made in the petition regarding the birth of the respondent no. 7, the petitioner has produced a copy of the Birth Certificate issued by the office of Vital Statistics, New Jersey at Annexure-A to the petition. The claim made in the petition is that the respondents no. 5 and 6 who were in India had desired to perform certain religious ceremony relating to the child in India and therefore asked the petitioner and the respondent no. 4 to come to India for that purpose. What is averred by the petitioner is that the respondent no. 4 had left U.S.A. for India earlier and thereafter the petitioner had come to India with the child on March 9, 2002 and at that time there was a dispute between the petitioner and the respondent nos. 4 to 6 regarding settling down in India. It is mentioned in the petition that on being insisted the petitioner had agreed to leave her job in U.S.A. and therefore had again gone to U.S.A. and when she had come back to India on April 12, 2002, the respondent nos. 4 to 6 had refused to hand over custody of the child to her and she was informed that she would be entitled to see her son only if she was inclined to give divorce to the respondent no. 4. What is mentioned in the petition is that she being the mother of the infant child is entitled to have custody of the child and therefore appropriate directions should be issued by the Court. Under the circumstances, the petitioner has filed the present petition and claimed the reliefs to which reference is made earlier.

3. The petition was notified for admission hearing before the Court on February 22, 2002 and after hearing the learned counsel for the petitioner, Rule was issued in the petition making it returnable on April 29, 2002. The respondent no. 3 - Police Inspector, Ellisbridge Police Station, Ahmedabad was directed to see that the respondent nos. 4, 5 and 6 produce the respondent no. 7 i.e. minor child Prem Baiju Pandit before the Court on the returnable date at 11-00 a.m. On that day i.e. April 29, 2002 a request was made by the learned counsel for the petitioner as well as the respondent no.4 to hear the matter in the chamber and therefore the matter was heard in the chamber. Having regard to the tender age of the child, the Court had directed the respondent no. 4 to hand over the custody of the child to the petitioner and accordingly the custody of the child was handed over to the petitioner.

4. Further the respondent no.4 had sought time in the matter to enable him to file an affidavit-in-reply for the purpose of contesting the petition and therefore the matter was adjourned to today i.e. May 6, 2002.

5. Today during the course of the hearing of the petition, the respondent nos. 4, 5 and 6 have filed the affidavit-in-reply and controverted the averments made in the petition. What is claimed by the respondent no. 4 in the affidavit-in-reply is that he being natural father of the infant child should be permitted to visit the child for reasonable hours and time and therefore while permitting the respondent no.4 to have custody of the respondent no. 7, appropriate directions in this regard should incorporated by the Court in its order. It is also mentioned in the affidavit-in-reply that the petitioner should not be permitted to part with the custody of the respondent no. 4 except in favour of the respondent no. 4 and that the respondent no. 4 should be permitted to have full access of all information about the location and well being of the respondent no. 4.

6. We have heard Shri S.V. Raju the learned counsel for the petitioner, the respondent no. 4 i.e. Baiju Virendra Pandit who has appeared in person as well as Ms. Nandini Joshi, learned A.P.P for the State.

7. The Supreme Court has ruled in several reported decisions that the custody of the minor who is below five years of age should normally be with the mother. Here in the facts of the case we find that the child aged only four months and therefore we are of the opinion that

having regard to the welfare of the child, we are of the opinion that the direction given by the Court on April 29, 2002 to the respondent no. 4 to hand over the custody of the respondent no. 7 to the petitioner deserves to be upheld. However, there is no manner of doubt that the respondent no. 4 is natural father of the respondent no. 7 and therefore he should be permitted to visit the child at all reasonable hours and time. In view of the suggestions made by the learned counsel for the petitioner as well as by the learned A.P.P. Ms. Joshi and the respondent no. 4, it is clarified that the respondent no. 4 being natural guardian and father of the infant child would be entitled to visit the child once in a month for a period of four hours between 10-00 a.m. to 7-00 p.m. at the place where the child is kept by the petitioner but he would not be entitled to remove the child to a different location. In view of the apprehension expressed by the petitioner, it is directed that while visiting the child once in a month for a period of four hours between 10-00 a.m. to 7-00 p.m. the respondent no. 4 shall behave in a decent manner with the petitioner and observe decorum. Whenever the respondent no. 4 desires to visit the child he shall in advance give intimation about his visit to the petitioner. The petitioner is directed not to part with the custody of the respondent no. 7 to any other person except the respondent no. 4 if at all she is desirous of parting with the custody of the respondent no. 7. Further it is directed that whenever the respondent no. 7 is shifted from the residence of the petitioner, the petitioner shall intimate the change in the address to the respondent no. 4 so that the right conferred on him to visit the child can be exercised effectively. The learned counsel for the petitioner has further stated that the petitioner would also inform the respondent no. 4 about well being of the child from time to time.

8. Subject to above referred to directions, Rule is made absolute.

(J.M. Panchal, J.)

(H.H. Mehta, J.)

/JVSatwara/